probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence."

In the instant case apart from the evidence that the deceased assisted the father at his fish stall there is no other evidence which can form as material for a reasonable assessment. No doubt the court is allowed to speculate to some extent but not just to have a figure "plucked from the air" (to use the words of counsel for the appellant here) without having some material on which to make the assessment. In this case the learned judge arrived at a figure of $180/- per month as his assessment of the probable income of the deceased. We feel that that figure was not based on any material put before him.

We are of the view that the appeal against this item of the damages should accordingly be allowed with costs. Order accordingly.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Brijnandan Singh Bhar & Co.*

GOLAM HASSAN BIN MUHAMAD v. SUSILA & ANOR.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) February 25, 1986 & February 3, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 102 of 1985]

Tort – Road accident – Death of victim – Whether deceased died as a result of injuries suffered as result of accident – Damages for pain and suffering – Damages for dependants – Whether damages for pain and suffering should be taken into account in assessing damages for dependants – Civil Law Act, 1956, ss. 7 & 8.

Damages – Fatal accident – Damages for pain, suffering and for dependants.

In this case one Subramaniam was riding a motorcycle on August 5, 1977 when it collided with a car driven by the appellant, as a result of which he suffered injuries. Subramanian filed a claim for damages against the appellant but subsequently he died on March 23, 1980. The action was continued by his widow and another person substituted as plaintiffs and the claim brought under sections 7 and 8 of the Civil Law Act, 1956. At the trial the learned trial judge gave judgment in the sum of $1,850 as special damages, in the sum of $20,000 as damages for pain and suffering and in another sum of $32,000 as damages for the family of the deceased pursuant to section 7 of the Civil Law Act, 1956. The appellant appealed, the main grounds of appeal being:

a) The learned Judge erred in holding that the deceased died as the result of the injuries which he suffered as the result of the collision;

b) The learned Judge should have treated the two items of damages as being merged. In other words in giving the damages under section 7 the learned Judge should have taken into account the damages which were assessed in respect of pain and suffering.

Expert evidence was called at the trial and the learned trial judge accepted the evidence of an expert that the deceased died of gastro intestinal bleeding and that the accident was the cause effect of his death.

Held: (1) there was evidence to support the conclusion of the learned trial judge in accepting the findings of the expert and she had not made any wrong inferences;

(2) the damages of $20,000 for pain and suffering assessed in this case under section 8 of the Civil Law Act, 1956, should be taken into account in the assessment of damages under section 7 of the Act. This meant that the plaintiffs should be awarded $32,000 only under sections 7 and 8 apart from the special damages of $1,850.

Cases referred to:

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.
(2) *Andrews* v. *Freeborough* [1966] 2 All E.R. 721.
(3) *Tan Chooi Thin & Anor.* v. *Teo Whee Hong* [1953] M.L.J. 203.
(4) *Lok Yin* v. *Pat Thoo* [1948] M.L.J. 26.
(5) *Feay* v. *Barnwell* [1938] 1 All E.R. 31.

SUPREME COURT.

Khoo Eng Chin (*A. K.J. D'Cruz* with him) for the appellant.

R. K. Nathan for the respondents.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the Judgment of the Court): On August 5, 1977, Subramaniam s/o Muniandy (hereafter referred to as the deceased) was riding a motorcycle when it collided with a car driven by the appellant, as the result of which he suffered some injuries.

On July 31, 1978, he filed a claim in the High Court for damages against the appellant for negligence. On March 23, 1980, he died. His Writ and Statement of Claim were amended so that his

widow and another person have been substituted as the plaintiffs and the claim has now been brought under sections 7 and 8 of the Civil Law Act 1956. At the trial the learned Judge of the High Court gave judgment in the sum of $1,850 as special damages, in the sum of $20,000 as damages for pain and suffering, and in another sum of $32,200 as damages for the family of the deceased pursuant to section 7 of the Act. There are two main grounds for bringing this appeal:

(a) The learned Judge erred in holding that the deceased died as the result of the injuries which he suffered as the result of the collision;

(b) The learned Judge should have treated the two items of damages as being merged. In other words in giving the damages under section 7 the learned Judge should have taken into account the damages which was assessed in respect of pain and suffering.

The following are the facts of the case as stated by the learned Judge in her judgment. Outwardly the deceased suffered only minor injuries namely an abrasion over his left forearm and a 2" laceration on the lower 1/3 of his left leg that required to be sutured. He was warded in the District Hospital, Kuala Pilah for 3 days and he was discharged on August 8, 1977. Following his discharge, the deceased started developing fits and each time this happened he sought treatment at the District Hospital, Kuala Pilah, and at one stage he was re-admitted as a patient. However, in February, 1980, when his fits started to be persistent, the District Hospital, Kuala Pilah, referred him to the University Hospital, Kuala Lumpur, where the doctor attending to him felt that he should be examined more thoroughly by the Neuro-Surgical Unit of the General Hospital, Kuala Lumpur, where facilities were available to determine the cause effect of his fits. Following his admission to the General Hospital, Kuala Lumpur, on February 29, 1980, X-rays of his skull showed no fracture whatsoever but an angiogram of his brain showed a contralateral shift of the anterior cerebral artery, *i.e.* the mid-line of the brain had been shifted to the left. Something had pushed the artery to the opposite side but the cause of this shift was never determined as the deceased died on March 23, 1980, whilst waiting for his turn to undergo a computer scan of his brain. In the meantime he developed acute gastro intestinal bleeding and despite efforts made to revive him, he succumbed to his illness due to the massive bleeding.

As to the ground of appeal (a) the complaints of the appellant can be summarised as follows. The learned Judge failed to appreciate that the long period of time that had passed between the accident and the death rendered the injuries received too remote to have any causal connection. She erred in preferring the evidence of expert witness Dr. C. Balaratnam to the evidence of another expert witness Dr. A. Mohandas. There was no evidence of any brain damage detected and X-rays showed no fracture of skull. The cause of the contralateral shift of the anterior cerebral artery was not determined. The impression reached by the Surgical Unit that the gastro intestinal bleeding developed from stress ulcer was not proved to be correct. It was therefore contended that the learned Judge should have held that the respondents had failed to discharge their burden of proving that the death was caused by injuries suffered as the result of the collision.

Dr. Balaratnam summarised his findings as follows. He stated that having seen all documents and having assessed all possibilities and probabilities it was his considered opinion that the gastro intestinal bleeding was caused by the stress which was caused by the shifting of the cerebral artery which was caused by the trauma experienced during the accident. He concluded that the deceased died of gastro intestinal bleeding and that the accident was the cause effect of his death. Earlier Dr. Balaratnam stated that from the law of probability the deceased had a trauma followed by recurrent left-sided seizures. From the angiogram it was highly likely that he had a chronic subdural haematoma that was there all along from the time of accident but over the years it had slowly and assiduously become bigger and thereby accounting for his increased chronic seizures. At some point of time during the deceased's stay in the hospital the brain was compromised beyond its limit and developed acute gastro intestinal bleed and died. This is called Cushings ulcer. On the other hand Dr. Mohandas gave his opinion that the 2½ years gap between the injury and the development of gastro intestinal bleeding was too wide to connect the brain injury as the cause of the gastro intestinal bleeding. He stated that there is a time limit for Cushings ulcer to occur from the onset of trauma, *i.e.* about two weeks from the onset of trauma, and it cannot happen after two years. The learned Judge gave her reasons for being more inclined to accept Dr. Balaratnam's evidence. In particular she stated that Dr. Mohandas' evidence that the ulcer can only develop two weeks from the onset of trauma is on his own admission unsupported by any other medical evidence. The learned Judge also accepted

the evidence of the deceased's wife and brother-in-law that the deceased had never suffered from fits before the accident.

As regards the other complaints in the memorandum of appeal Dr. Balaratnam's evidence shows that he had considered all aspects relating to the question of fracture of skull, the brain, the shift of the cerebral artery, the gastro intestinal bleeding, stress ulcer and other relevant matters before making his findings as stated above and the learned Judge accepted his findings. We find that there is evidence to support the conclusion of the learned Judge and that she had not made any wrong inferences. We also find that the learned Judge had adequately considered the matters that are now being complained of.

As to ground (b), counsel for the respondents relies on section 8(5) of the Civil Law Act for contending that the learned Judge was right in awarding the two items of damages in full without deduction of one from the other. Section 8(5) reads:

"The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

An issue similar to the one which is now raised here, was considered by the House of Lords in the case of *Davie* v. *Powell Duffryn Associated Colliers Ltd.*[1] Like section 7 of the Civil Law Act, the Fatal Accidents Act 1846 of England provides that whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the parties injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused. Like section 8 of the Civil Law Act, the Law Reform (Miscellaneous Provisions) Act 1934 of England provides that on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate, except certain causes of action specified therein. It also contains in section 1(5) provisions similar to section 8(5) of the Civil Law Act. In that case the House of Lords held that damages for shortened expectation of life recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, should be taken into account in assessing damages under the Fatal Accidents Act 1846, in the case of the dependants who would benefit from the damages under the Act of 1934. *Per* Lord Russell of Killowen:

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately. It is rightly conceded that the general rule must apply unless some statutory exception to it prevents its application. There are two well-known instances in which such a statutory exception has been enacted. One is the case of life insurance ... The other instance relates to pensions ... The appellants claim that a statutory exception to the rule in relation to damages recoverable under the Act of 1934 is to be found in section 1, sub-section 5, of that Act, which runs thus: The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908. All that this subsection does, according to the language used, is to provide that the rights shall coexist, but I can find no words which would justify me in holding that the subsection purports to alter the measure of the damages recoverable for the benefit of a dependant under the Fatal Accidents Acts. The language of the sub-section falls far short of this, and its weakness for the purpose to which the appellants seek to apply it is emphasized by a comparison of the language used therein with the clear and unambiguous provisions of the two statutory exceptions to which I have referred and by the fact that the Act which enacts the earlier of the two exceptions is actually mentioned in the sub-section in question. It was sought to extract some special meaning from the dual phrase 'shall be in addition to and not in derogation of.' This, it was said, was not idly tautological, but intentionally cumulative, and the words "not in derogation of" involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Acts. For myself, I can see no sufficient ground for reading this subtle hidden meaning into the subsection. I agree with the Court of Appeal that the words 'and not in derogation of' merely emphasize what has been already said, that the rights conferred by one Act are additional to the rights conferred by the other Acts, and are to that extent tautological."

Counsel for the respondents referred to the case of *Andrews* v. *Freeborough*[2] and pointed out that in that case the total amount of two items of damages, one for loss of expectation of life and the other for loss of faculty, was awarded without deduction. In that case a girl aged eight, was injured in a motor accident. From the time of her

being injured until her death nearly a year later she was unconscious and without pain and without appreciation of what had happened to her. In an action by her father as administrator of her estate general damages of £2,500 were awarded, of which £500 was for loss of expectation of life and £2,000 for loss of faculty. The Court of Appeal affirmed the award. In our view damages for loss of expectation of life and damages for loss of faculty were damages properly assessed under the Law Reform (Miscellaneous Provisions) Act 1934. The report does not show that damages were also assessed under the Fatal Accident Act, and therefore in that case there would be no question of or necessity for any deduction in the damages assessed.

Davies' case was followed in this country in the case of *Tan Chooi Thin & Anor.* v. *Teo Whee Hong*[3] in which claims were brought under the Civil Law Ordinance Cap. 42 of the Straits Settlement. *Lok Yin* v. *Pat Thoo*[4] was another case in which the same principle was adopted. In *Feay* v. *Barnwell*[5] a woman was killed in a street accident as the result of the defendant's negligence. Damages were assessed at £625 under the Fatal Accidents Act 1846, and at £600 under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of pain and suffering and loss of expectation of life. The net amount of damages in respect of pain and suffering and loss of expectations of life of £575 (after reduction of £25 for administration expenses) was deducted from the £625 damages under the Fatal Accidents Act and the balance sum of £50 was awarded to the plaintiff under the Fatal Accidents Act together with the £600 damages under the Law Reform Act.

Therefore we hold that the damages of $20,000 for pain and suffering assessed in this case under section 8 should be taken into account in the assessment of damages under section 7. This means that the plaintiffs should be awarded damages of $32,200 only under sections 7 and 8 apart from the special damages of $1,850. We order that the judgment amount be reduced accordingly. To that extent this appeal is allowed, with costs to the appellant. We also order that the deposit be refunded to him.

Order accordingly.

Solicitors: *A.K.J. D'Cruz & Co.; R.K. Nathan & Co.*

NG YAU THAI v. PUBLIC PROSECUTOR

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) September 22, 1986 & February 7, 1987]

[Kuala Lumpur – Supreme Court Criminal Reference No. 1 of 1986]

Evidence – Accomplice – Evidence of – Need for corroboration – Danger of accepting uncorroborated evidence of accomplice – Magistrate convicting on such evidence must have risk of so doing in his mind and indicate accordingly in his judgment – Evidence Act, 1950, s. 114(b) and 133 – Courts of Judicature Act, 1964, s.66.

In this case the following question of law was referred to the Supreme Court:

"Whether or not the High Court was right in ruling owing to the strenuous submission made by defence counsel at the Magistrate's Court on the question of the danger of accepting the uncorroborated testimony of an accomplice, the Court must have had the risk in its mind before accepting the uncorroborated testimony of the accomplice without requiring some indication in the judgment itself that the magistrate had this rule of caution in mind."

In his judgment dismissing the appeal from the learned magistrate the learned judge had stated that he was satisfied that the learned magistrate had clearly in her mind the warning concerning the risk of accepting the uncorroborated testimony of an accomplice and that this was clearly borne out by the notes of the evidence of the case in the court below.

Held: (1) in such a case where the trial judge has convicted on the uncorroborated evidence of an accomplice, the mind of the trial judge can only be gathered from the contents of his judgment and nowhere else. To look elsewhere to try to ascertain the judge's mind would be tantamount to taking irrelevant matters into consideration;

(2) if the subjective satisfaction of the trial magistrate was based on the notes of submission of learned counsel for the accused and the learned Deputy Public Prosecutor instead of the written judgment, then the learned judge hearing the appeal had misdirected himself on the law;

(3) in this case in fact the trial magistrate had in mind such warning concerning the risk of accepting the uncorroborated testimony of an accomplice and this was clearly indicated in her judgment;

(4) although the answer to the certified question is that the High Court was wrong in law to hold that the warning need not appear in the judgment or grounds of decision of the trial magistrate, however in this case the warning did appear in the judgment and the appeal should be dismissed.

Cases referred to:

(1) *Bereng Griffith Lerotholi & Ors.* v. *The King* [1950] A.C. 11.
(2) *Chiu Nang Hong* v. *Public Prosecutor* [1965] 1 M.L.J. 40.
(3) *R.* v. *Spencer* [1986] 2 All E.R. 928, 937.